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Lawsuit against stormwater fee flowing again

A divided appellate ruling sends a lawsuit over Winnetka's stormwater fee back to circuit court

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A divided state appeals panel on Tuesday revived a lawsuit challenging the constitutionality of a stormwater utility fee imposed by an affluent North Shore community.

Two justices on a 1st District Appellate Court panel found Mark Green had pleaded a sufficient amount of facts to challenge the constitutionality of the fee imposed by the village of Winnetka.

The 13-page unpublished order remanded the case without ruling on whether the fee itself is constitutional.

"We hold only that the circuit court erred in dismissing this matter at the pleading stage," Justice Sheldon A. Harris wrote for the majority. He was joined in the opinion by Justice Joy V. Cunningham.

Justice Maureen E. Connors disagreed in a four-page dissent, arguing Green's lawsuit did not actually set out the facts to challenge the constitutional validity of the fee. Instead, Green argued "conclusions."

"[A] plaintiff must allege facts, not mere conclusions, to establish his claim as a viable cause of action," Connors wrote.

The case will return before Cook County Circuit Judge Kathleen G. Kennedy for further proceedings.

"We look forward to proving that Winnetka's stormwater fee is not based on usage, but is really a disguised tax to pay off bonds on an infrastructure project," said Todd L. McLawhorn, one of Green's attorneys, in an interview.

After suffering a "100-year flood" in 2011, the village began to design a stormwater system that could withstand that level of flooding.

To that end, the village drafted a master plan that would see the creation of a 7,900-foot-long storm sewer — referred to by the panel as "the tunnel" — as well as other improvements to the village's stormwater infrastructure.

The tunnel was slated to cost $34.5 million; the other improvements another $8 million. To pay for the tunnel, the village issued bonds that would cost $61.5 million over 30 years.

In March 2014, the village adopted its stormwater ordinance, which imposes the stormwater utility fee on property owners. This fee had two components: A base fee, which paid for the debt on the stormwater system, and other rates and charges that took care of "all costs related to operating, maintaining improving the stormwater utility," Harris wrote.

Winnetka's website outlines how the fee is calculated for each property owner based on the amount of "impervious surface" on the property — including paved driveways, sidewalks, patios, roofs, swimming pools and basketball or tennis courts.

The village bills $21.83 per month for every 3,400 square feet of impervious surfaces on the property.

According to the panel and McLawhorn, the village has since discontinued the tunnel portion of its plan.

Green filed a class-action lawsuit in February 2015, arguing the fee imposed by the village is actually a tax. McLawhorn said Green is the only named plaintiff but has received support from others in the village.

McLawhorn said the fee costs "a couple of hundred dollars" a month, and it varies from month to month.

Under state law, a municipality can impose fees for services rendered; a tax, however, is a charge from the government to fund general public needs. Taxes also require voter approval; fees do not.

The village argued its fee is in fact a fee because it is based on how much it costs to operate the stormwater system, which is used by property owners.

The village sought to dismiss Green's lawsuit for insufficient pleadings, which Kennedy granted in August 2015.

On appeal, Green argued his lawsuit did set out enough facts for a facial constitutional challenge of the village's stormwater utility fee — like how it's applied regardless of how much runoff property owners pour into the system.

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Harris and Cunningham, for instance, pointed to the ordinance's description of the base fee, which is applied to take care of any outstanding debt on the system.

"By the plain language of the ordinance the base fee bears no relation to the construction, maintenance or operation of the stormwater system," Harris wrote.

Connors, however, pointed to other language in the ordinance that describes the stormwater fee as the base fee and "other rates, fees and charges ... to recover all costs related to operating, maintaining and improving the stormwater system utility."

Citing this, Connors wrote Green's lawsuit does not have a factual basis to stand on, especially after tossing aside a number of his allegations as being conclusions rather than facts.

The panel was also divided on whether the village was correct in citing a 2005 3rd District case that upheld another municipality's stormwater fee.

Harris and Cunningham held the village could not rely on *Church of Peace v. City of Rock Island*, 357 Ill. App. 3d 471 (2005) because that case was only dismissed on summary judgment and not a pleading issue.

But Connors noted the *Church of Peace* decision is standing case law. The court there found a "stormwater service charge was clearly a fee" and there was "a rational relationship between the amount of the fee and the contribution of a parcel to the use of the stormwater system."

Green was represented by McLawhorn and Gregg M. Barbakoff of Siprut P.C.

The village was represented by Peter M. Friedman, Christopher J. Murdoch and Karl D. Camilluccl of Holland & Knight LLP. They did not return a request for comment.

The case is *Mark Green v. The Village of Winnetka*, 2016 IL App (1st) 152475-U.

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